MACE COX

IBLA 78-472 Decided December 20, 1978

Appeal from decision of Colorado State Office, Bureau of Land Management, rejecting public sale application C-13981.

Affirmed.

1. Act of September 26, 1968--Public Sales: Applications --Public Sales: Sales Under Special Statutes

   An application to purchase public land filed pursuant to the Unintentional Trespass Act, 43 U.S.C. §§ 1431-1435 (1970), is properly rejected when the Geological Survey reports that such lands are underlain with coal, and that exercise of surface rights would unreasonably interfere with operations under the Mineral Leasing Act of 1920. In addition, the public interest dictates rejection of the application because conveyance of the surface rights could allow the surface owner, pursuant to the Surface Mining Control and Reclamation Act of 1977, to prevent strip mining of the underlying coal by withholding his consent to mine.

2. Act of September 26, 1968--Geological Survey--Public Sales: Generally--Public Sales: Applications

   A determination by the United States Geological Survey that certain lands in an application for sale under the Unintentional Trespass Act, 43 U.S.C. §§ 1431-1435 (1970), are underlain with coal, and that sale of the surface rights would interfere with the operation of the Mineral Leasing Act of

> 1920, will not be disturbed in the absence of a clear showing by the applicant that the determination was improperly made.

APPEARANCES: Thomas E. Schaiberger, Esq., Rangely, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Mace Cox appeals from a decision issued by Andrew W. Heard, Jr. Leader, Craig Team, Branch of Adjudication, Colorado State Office, Bureau of Land Management (BLM), rejecting public sale application C-13981 filed pursuant to the Unintentional Trespass Act of September 26, 1968, 43 U.S.C. §§ 1431-1435 (1970). 1/ The application for public sale of 104.38 acres in Rio Blanco County, Colorado, was filed on September 20, 1970.

At the request of the Bureau of Land Management, the United States Geological Survey (USGS) issued a mineral report dated October 27, 1971, on the land in issue which reads as follows: "Geological Survey information indicates that this land is valuable for oil and gas and coal; that is without value for other minerals; and that the exercise of surface rights on this land would not interfere unreasonably with operations under the mineral leasing laws."

BLM took no action on the application and in October 1977, requested an update on the mineral status of the land. On November 22, 1977, Area Geologist, Conservation Division, CRMA, reported to the Colorado State Director that the land contains coal and that the sale or exchange of surface rights would interfere with operations under the mineral leasing laws.

In response to an inquiry concerning the discrepancy in these two reports, the director, USGS, explained thus in a memorandum dated March 28, 1978:

> Subject land of application C-13981 is in the Lower White River Known Recoverable Coal Resource Area.
>
> The original memorandum of October 27, 1971 was written before the passage of the Surface Mining Control and Reclamation Act of 1977. The second memorandum of November 22, 1977 takes into account this Act which gives veto power to surface owners. Therefore, the sale or

---

1/ Sales under the Unintentional Trespass Act are now governed by the provisions of section 214 of the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C.A. § 1722 (West Supp. 1978).

> exchange of surface rights would interfere with operations under the mineral leasing laws as stated in the memorandum of November 27, 1977.

Based on the report of the USGS, the State Office issued a decision dated May 11, 1978, rejecting appellant's application. The State Office cited Edward H. Swartz, 31 IBLA 210 (1977), as authority for its decision. In this case the Board held that an:

> [A]pplication to purchase public land filed pursuant to the Unintentional Trespass Act, 43 USC Sections 1431-1435 (1970) is properly rejected . . . when the Geological Survey reports that such lands are underlain with coal, and that exercise of the surface rights would unaccountably interfere with operations under the Mineral Leasing Act of 1920.

In his statement of reasons appellant charges that the State Office decision failed to indicate how or why the sale would interfere with the Mineral Leasing Act and the coal resources located beneath the surface of the land. Appellant assumes that BLM rejected his application because the land is needed for public purposes. To qualify for public sale the land must not be needed for public purposes. Appellant contends that the sale of surface rights to him would not interfere with operations under the Mineral Leasing Act even if the land were needed for public purposes. Appellant explains that the extraction of coal is the only public purpose for which the land could be used. Appellant reasons that the sale of this land would not interfere with coal operations because the United States has authority under 30 U.S.C. § 81 (1970) to reserve the coal deposits upon the sale of the land.

Appellant claims that he has irrigated and cultivated the land since 1962 and has complied with the provisions of the Act. Citing 30 U.S.C. § 85 (1970), appellant claims that he is entitled to receive a patent to the land with a reservation to the United States of all coal. Appellant notes that the legislative history of the Act also considers the possibility of a conveyance being made with a reservation of coal to the United States. H.R. Rep. No. 1791, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. & Ad. News 3611, 3614.

[1] 43 CFR 2093.0-3(a) provides the Secretary of the Interior has discretion to determine whether the surface of public lands reported as valuable for any leasable mineral should be disposed of, and states that a nonmineral application may be allowed only "if it is determined by the proper officer, with the concurrence of the Director, Geological Survey, that the disposal of the lands under the nonmineral application will not unreasonably interfere with current or contemplated operations under the Mineral Leasing Acts." USGS points out that the Surface Mining Control and Reclamation Act of 1977 30 U.S.C.A. § 1304 (West Supp. 1978) gives to the surface owner the

power to veto surface mining of underlying coal. This provides a sound basis for the determination of USGS that the sale of surface rights would interfere with operations under the mineral leasing laws. Edward H. Swartz, supra. Thus, the decision does particularize how and why sale of the land would interfere with operations under the mining laws.

While it is true that the regulations (43 CFR subpart 2093) make provision for disposal of the surface of lands such as those in issue, the USGS has determined in effect that disposal in this instance would not be in the public interest. The Kemmerer Coal Company, 26 IBLA 127 (1976). Since the Surface Mining Control and Reclamation Act, supra, grants veto power to the surface owner, such owner has the leverage to extract an exorbitant price from a possible coal developer. See Edward H. Swartz, supra at 212-213.

[2] A determination by the United States Geological Survey that certain lands are underlain with coal and that sale of the surface rights would interfere with the operation of the Mineral Leasing Act of 1920 will not be disturbed in the absence of a clear showing by the applicant that the determination was improperly made. See The Kemmerer Coal Company, supra at 130; William J. Colman, 9 IBLA 15, 20 (1973). Appellant has made no such showing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Anne Poindexter Lewis
Administrative Judge

We concur:

_____
Edward W. Stuebing
Administrative Judge

_____
Douglas E. Henriques
Administrative Judge